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SUPREME COURT OF THE UNITED STATES.

No. 173.

JOSEPH H. LYON, PLAINTIFF IN ERROR,

vs.

JOHN BERTRAM, ALEXANDER H. TWOMBLY, AND EDWIN LAMSON, DEFENDANTS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICTS OF CALIFORNIA.

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GIDEON, Print.

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Pleas before the honorable M. Hall McAllister, judge of the circuit court of the United States of America for the districts of California, at the court-house in the city of San Francisco, on the twenty-second day of October, of October term of said court, in the year of our Lord one thousand eight hundred and fifty-five.

Witness the honorable M. Hall McAllister, judge of said court.

DISTRICTS OF CALIFORNIA, *ss:*

Be it remembered, that heretofore, to wit, on the 13th day of September, A. D. 1855, came the plaintiffs, John Bertram, Alexander H. Twombley and Edwin Lamson, by John K. Hackett, esq., their attorney, and filed in the clerk's office of the court aforesaid their certain bill of complaint against Joseph H. Lyon, defendant, of a plea of trespass in the case, which, together with an admission of the service of the summons, and of a copy of said bill, follows in these words, that is to say:

Circuit Court of the United States in and for the State of California.

JOHN BERTRAM, ALEXANDER H. TWOMBLY and EDWIN LAMSON,
vs.
JOSEPH H. LYON.

UNITED STATES OF AMERICA,
Northern district of California, ss:

John Bertram, Alexander H. Twombly and Edwin Lamson, plaintiffs in this suit, residents of the city of Boston, and citizens of the State of Massachusetts, by John K. Hackett, their attorney, complain of Joseph H. Lyon, defendant, a citizen of the State of California, residing at the city of San Francisco, and for cause of complaint show:

That the said defendant, heretofore, to wit, on the first day of September, 1854, at the city of San Francisco, State of California aforesaid, was indebted to James P. Flint, Alfred Peabody, Edward P. Flint and these plaintiffs, all then and there being citizens of the said State of Massachusetts, in the sum of sixty thousand dollars, lawful money of the United States of America, for a certain cargo of two thousand barrels of flour, by the said James P. Flint, Alfred Peabody, Edward P. Flint, and these plaintiffs, before that time sold and delivered by the said James P. Flint, Alfred Peabody, Edward P. Flint, and these plaintiffs, to the said defendant, at the said city of San Francisco, and State of California, and at the special instance and request of the defendant; and being so indebted, he, the defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, undertook and then and there faithfully promised the said James P. Flint, Alfred Peabody and Edward P. Flint, and

these plaintiffs, well and truly to pay unto them the said sum of sixty thousand dollars, when he, the defendant, should be thereunto afterwards requested.

And whereas, also, the defendant, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, in consideration that the said James P. Flint, Alfred Peabody and Edward P. Flint, and these plaintiffs, all then and there being citizens of the State of Massachusetts, at the like special instance and request of the defendant, had before that time sold and delivered to the defendant certain other two thousand barrels of flour, of them the said James P. Flint, Alfred Peabody, and Edward P. Flint, and these plaintiffs. undertook, and then and there faithfully promised them, the said James P. Flint, Alfred Peabody and Edward P. Flint, and these plaintiffs, to pay them, the said James P. Flint, Alfred Peabody, Edward P. Flint and these plaintiffs, so much money as the said last mentioned two thousand barrels of flour at the time of the sale and delivery were reasonably worth, when the defendant should be thereunto afterwards requested; and the plaintiffs aver that the said last mentioned two thousand barrels of flour, at the time of the sale and delivery thereof, were reasonably worth the further sum of sixty thousand dollars, of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the defendant afterwards, to wit, on the same day and year, and at the place aforesaid, had notice.

And whereas, also, the defendant, heretofore, to wit, on the same day and year aforesaid, at the place aforesaid, was indebted to James P. Flint, Alfred Peabody, Edward P. Flint, and these plantiffs, all then and there being citizens of the State of Massachusetts aforesaid, in the further sum of sixty thousand dollars, lawful money of the United States, for other two thousand barrels of flour by the said James P. Flint, Alfred Peabody, Edward P. Flint, and these plaintiffs, before that time bargained and sold by them to the defendant, and at his special instance and request, and being so indebted, he, the defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said James P. Flint, Alfred Peabody, Edward P. Flint, and these plaintiffs, well and truly to pay unto them the said sum of sixty thousand dollars, when he, the said defendant, should be thereunto afterwards requested.

And whereas, also, the defendant, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, in consideration that the said James P. Flint, Alfred Peabody, Edward P. Flint, and these plaintiffs, at the like special instance and request of the defendant, had before that time bargained and sold to the defendant certain other two thousand barrels of flour, he, the said defendant, undertook and then and there faithfully promised the said James P. Flint, Alfred Peabody, and Edward P. Flint, and these plaintiffs, to pay them so much money as the said last mentioned two thousand barrels of flour at the time of the said bargain and sale thereof were reasonably worth, when the said defendant should be thereunto afterwards requested.

And these plaintiffs aver that the said last mentioned two thousand barrels of flour were reasonably worth the further sum of sixty thousand dollars of like lawful money as aforesaid, to wit, at the place aforesaid, whereof the defendant afterwards, namely, on the day and year and at the place aforesaid, had notice.

And these plaintiffs further aver that the said James P. Flint, Alfred Peabody, and Edward P. Flint, afterwards, to wit, on the second day of September, 1854, at Boston, to wit, at the place aforesaid, by an instrument under their hands, and for a valuable consideration therein expressed, did sell, assign, convey, relinquish, and release to John Bertram, one of the plaintiffs, all their and each of their interests in and to the said claim against the defendant, and in and to the amount due and owing for the price of said several parcels of flour from him, the defendant, to the said James P. Flint, Alfred Peabody, Edward P. Flint, and these plaintiffs, of which said assignment the defendant afterwards, to wit, at the place aforesaid, to wit, on the 18th day of November, 1854, had notice.

Whereby the said defendant became and was indebted to the plaintiffs in the said several sums of money above mentioned.

Nevertheless the defendant, although often requested so to do, hath not yet paid the said several sums of money above mentioned, or any or either of them, or any part thereof, to these plaintiffs, or the said James P. Flint, Alfred Peabody, and Edward P. Flint, but to pay the same, or any part thereof, to the said plaintiffs, or to any person in their behalf, the said defendant hath hitherto altogether refused, and still doth refuse, to the damage of the plaintiffs of sixty thousand dollars; and therefore the plaintiffs demand judgment against the said defendant for that amount, together with the costs of this action.

Dated San Francisco, August 31, 1855.

(Signed) JOHN K. HACKETT,
Pl'ffs' Att'y.

Endorsed:

We appear for the defendant Joseph H. Lyon, and admit due service of summons and copy of complaint in this action.

Dated August 31, 1855.

(Signed) SAUNDERS & HEPBURN,
For Def't.

Endorsed:

Filed September 13th, A. D. 1855.
GEO. PEN. JOHNSTON, *Clerk.*

And afterwards, to wit, on the thirteenth day of September, in the year of our Lord one thousand eight hundred and fifty-five, an answer was filed by the defendant in the aforesaid cause, in words and figures as follows, to wit:

Circuit Court of the United States in and for the California districts.

JOHN BERTRAM, ALEXANDER H. TWOMBLY, and EDWIN LAMSON,
vs.
JOSEPH H. LYON.

UNITED STATES OF AMERICA,
Northern district of California, ss:

And the said defendant comes and says, that this honorable court ought not to have or maintain jurisdiction of the aforesaid action, because he says, that at the time of the making of the several pretended promises and undertakings by the defendant to the said plaintiffs, as described in the complaint, and ever since that time, both the said James P. Flint and Edward P. Flint, pretended assignors of said pretended causes of action, and this defendant, were and are citizens of the State of California, and residents of said State, and this he is ready to verify.

Wherefore he prays judgment, if this court will or ought to have further cognizance of said action.

Dated San Francisco, September 13, 1855.

(Signed) J. H. LYON.

Circuit Court of the United States in and for the California districts.

JOHN BERTRAM and others
vs.
JOSEPH H. LYON.

UNITED STATES OF AMERICA,
Northern district of California, ss:

Joseph H. Lyon, the defendant in this cause, maketh oath and saith, that the foregoing plea is true in substance and fact.

(Signed) J. H. LYON.

Sworn to before me this 13th day of September, 1855.

(Signed) GEO. PEN. JOHNSTON,
Clerk.

Endorsed:

Filed September 13th, 1855.

GEO. PEN. JOHNSTON,
Clerk.

And afterwards, to wit, on the twenty-second day of September, in the year of our Lord one thousand eight hundred and fifty-five, a reply was filed by the plaintiffs in the aforesaid cause, in words and figures as follows, to wit:

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Circuit Court of the United States in and for the California districts.

JOHN BERTRAM, ALEXANDER H. TWOMBLY, and EDWIN LAMSON, vs. JOSEPH H. LYON.

UNITED STATES OF AMERICA,
Northern district of California, ss:.

And the said plaintiffs, replying to the said answer or plea of the said defendant, deny, that at the time of the making of the several promises and undertakings by the defendant to the said plaintiffs described in the complaint, and ever since that time, both the said James P. Flint and Edward P. Flint, assignors of said causes of action, and the said defendant, were and are citizens and residents of the State of California, and that the said court ought not to have and maintain jurisdiction of the aforesaid action.

Wherefore the said plaintiffs pray, that the said answer of the said defendant may be hence dismissed with costs.

Dated September 22, 1855.

(Signed) JNO. K. HACKETT,
Att'y Pl'ffs.

Endorsed:

Filed Sept. 22d, A. D. 1855.

(Signed) GEO. PEN. JOHNSTON,
Clerk.

And afterwards, to wit, on the fourteenth day of November, in the year of our Lord one thousand eight hundred and fifty-five, before the judge aforesaid, at the court-house aforesaid, being a term of said court, the following order was duly made and entered in said cause, to wit:

At a stated term of the circuit court of the United States of America for the districts of California, held at the court-house in the city of San Francisco, on Wednesday, the 14th day of November, in the year of our Lord one thousand eight hundred and fifty-five.

Present, the honorable M. Hall McAllister, judge of said court.

JOHN BERTRAM et al. vs. JOSEPH H. LYON.

In this cause, after hearing argument of counsel for the respective parties—

It is ordered, that the defendant's attorney be permitted to withdraw his plea to the jurisdiction.

Endorsed: Filed Nov'r 14th, A. D. 1855.

(Signed) GEO. PEN. JOHNSTON, *Clerk.*

And afterwards, to wit, on the sixteenth day of November, in the year of our Lord one thousand eight hundred and fifty-five, before the

judge aforesaid, at the court-house aforesaid, at the aforesaid term of said court, the following order was duly made and entered in said cause, to wit:

United States Circuit Court for the Districts of California.

JOHN BERTRAM, ALEXANDER H. TWOMBLY, AND EDWIN LAMSON,
vs.
JOSEPH H. LYON.

The defendant having moved, pursuant to previous notice, for liberty to withdraw his plea to the jurisdiction and plea in bar, and also that the plaintiffs elect upon which of the counts of the declaration they will rely, and that the others be stricken out; and counsel having been heard in support of, and in opposition to, said motion: It is ordered that said motion be so far granted that the defendant have leave within three days to withdraw his plea to the jurisdiction and plea in bar, and that the residue of said motion be denied.

Dated San Francisco, November 16, 1855.

Endorsed: Filed November 16, A. D. 1855.
GEO. PEN. JOHNSTON, *Clerk*.

And afterwards, to wit, on the twelfth day of December, in the year of our Lord one thousand eight hundred and fifty-five, a stipulation was filed by the plaintiff in the aforesaid cause in words and figures as follows, to wit:

UNITED STATES CIRCUIT COURT.

JOHN BERTRAM and others
vs.
JOSEPH H. LYON.

The filing of the defendant's plea in bar (in lieu of the plea in abatement withdrawn under the order heretofore made by the court) having been delayed to this time by the attorneys for the plaintiff, the same may now be filed, and will be in season. Plaintiffs to have ten days from the day of the date of the filing of the answer to reply or demur.

Dated December 11th, 1855.

(Signed) JOHN K. HACKETT,
Pl'ffs Att'y.

(Signed) H. P. HEPBURN,
For Defendant.

Endorsed: Filed Dec. 12th, A. D. 1855.
GEO. PEN. JOHNSTON, *Clerk*.

And afterwards, to wit, on the twelfth day of December, in the year of our Lord one thousand eight hundred and fifty-five, another answer was filed by the defendant in the aforesaid cause, in the words and figures as follows, to wit:

Circuit Court of the United States in and for the California districts.

JOHN BERTRAM, ALEXANDER H. TWOMBLY, and EDWIN LAMSON,
vs.
JOSEPH H. LYON.

UNITED STATES OF AMERICA,
Northern district of California.

The defendant, Joseph H. Lyon, for answer to the complaint in this action, says, that the plaintiffs ought not to have and maintain said action aforesaid against him, because he says that the said several causes of action in said complaint mentioned did not, nor did any or either of them, accrue to the said plaintiff at any time within two years next before the commencement of this suit, in manner and form as the said plaintiff hath above thereof complained against the said defendant, and this he is ready to verify; wherefore he prays judgment, if the said plaintiff ought to have or maintain his aforesaid action against him.

And the said defendant, further answering said complaint by leave of the court, denies all and singular the allegations of the complaint filed in this above entitled action, except as herein expressly admitted, and demands strict proof thereof. Denies that he, the defendant, on the 1st of September, 1854, or at any time at said district of California, was indebted to James P. Flint, Alfred Peabody, Edward P. Flint, and the plaintiffs, in the sum of sixty thousand dollars, for a cargo of two thousand barrels of flour by them before that time sold and delivered to defendant, as alleged in said complaint. Denies that on the day and year aforesaid, or at any time, he undertook and promised said alleged vendors to pay them said sum in manner and form as alleged.

Further answering, defendant denies that in consideration that the said pretended and alleged vendors, then being citizens of the State of Massachusetts, had at the defendant's instance and request, on said day and year, sold and delivered to defendant certain other two thousand barrels of flour; the defendant undertook and promised to pay them the reasonable worth thereof at the time of such sale and delivery, in manner and form as alleged; and denies expressly such sale and delivery, and all and singular the other allegations in said complaint, and touching said sale and delivery and the value of said flour contained.

Further answering, defendant denies that on the day and year aforesaid, or at any time, he, the defendant, was then and there indebted to said pretended and alleged vendors in the sum of sixty thousand dollars, for other two thousand barrels of flour by them before that time bargained and sold to defendant at his special instance and request, and that being so indebted, he, in consideration thereof, afterwards, to wit, on the day and year aforesaid, or at any time, promised to pay them said sum when thereunto afterwards requested by them in manner and form as alleged.

And defendant expressly denies all the allegations of said complaint in this behalf.

Defendant further answering denies, that on the day and year aforesaid, or at any time, in consideration that the said pretended and alleged vendors had, at his special instance and request, bargained and sold to him certain other two thousand barrels of flour, that he, the said defendant, undertook and promised to pay them the reasonable worth of said flour at the time of said bargain and sale when thereunto afterwards requested in manner and form as alleged; and denies all the allegations of said complaint touching the same and the value of said flour, and notice to defendant.

Denies that said James P. Flint, Alfred Peabody, and Edward P. Flint, did, in the manner and for the consideration alleged, assign and transfer, and sell to said Bertram their and each of their interest in and to said alleged claim and amount, in manner and form as alleged.

Wherefore, defendant prays to be hence dismissed, with his reasonable costs in this behalf unjustly sustained.

(Signed) SAUNDERS & HEPBURN,
For Lyon.

Dated San Francisco, November 20th, 1855.

It is hereby stipulated, that the plea heretofore filed in the within action be withdrawn, and the within answer be considered the answer in the case.

Dated San Francisco, Nov. 21st, 1855.

Endorsed: Filed December 12th, A. D. 1855.
GEO. PEN. JOHNSTON, *Clerk.*

And afterwards, to wit, on the twentieth day of December, in the year of our Lord one thousand eight hundred and fifty-five, a demurrer was filed by the plaintiffs in the aforesaid cause, in words and figures as follows, to wit:

Circuit Court of the United States in and for the California districts.

JOHN BERTRAM, ALEXANDER H. TWOMBLY, and EDWIN LAMSON,
vs.
JOSEPH H. LYON.

UNITED STATES OF AMERICA,
Northern district of California.

And the said plaintiffs, as to the said plea by the said defendant first above pleaded, say: That the same and the matters therein contained are not sufficient in law to bar or preclude them, the said plaintiffs, from having and maintaining their aforesaid action against the said defendant.

And the said plaintiffs, according to the form of the statute in such case made and provided, state and show to the court here the following causes of demurrer to said first plea:

1st. The said plea is defective and bad, because it does not set forth the facts upon which the same is founded.

2nd. The said plea is bad, because it does not show that the plaintiffs' action belongs to that class of actions that must be commenced under the statute within two years.

3rd. The said plea is bad, because it does not appear from said plea that the contract upon which said plaintiffs' action is brought is not founded on an instrument in writing.

Wherefore the said plaintiffs pray judgment, whether by reason of anything contained in said first plea, they ought to be barred from having and maintaining their aforesaid action against said defendant.

(Signed) JAMES DOYLE, AND BARBER & BOYD,
Atty's for Pl'ffs.

Endorsed:
Dec'r 20th, 1855.

We admit due service of a copy of the within demurrer, and agree that the other pleas put in shall be deemed to put the cause at issue as to them, without any formal conclusion to the country or similiter.

(Signed) SANDERS & HEPBURN.

Endorsed:
Filed December 20th, A. D. 1855.
GEO. PEN. JOHNSTON, *Clerk.*

And afterwards, to wit, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and fifty-five, a joinder in demurrer was filed by the defendant in the aforesaid cause, in words and figures as follows, to wit:

Circuit Court of the United States in and for the California districts.

JOHN BERTRAM, ALEXANDER H. TWOMBLY, and EDWIN LAMSON,
vs.
JOSEPH H. LYON.

UNITED STATES OF AMERICA,
Northern district of California.

And the said defendant saith, that his said plea, by him first above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiffs from having or maintaining their aforesaid action thereof against him, the said defendant; and that he, the said defendant, is ready to verify and prove the same as the said court here shall direct and award.

Wherefore, inasmuch as the said plaintiffs have not answered the said plea, nor hitherto in any manner denied the same, the said defendant prays judgment, that the said plaintiffs may be barred from

having or maintaining their aforesaid action thereof against him, the said defendant.

Dated San Francisco, December 22d, 1855.

(Signed) SAUNDERS & HEPBURN, *Def'ts Att'ys.*

Endorsed: Filed December 26th, A. D. 1855.

GEO. PEN. JOHNSTON, *Cl'k.*

And afterwards, to wit, on the eighth day of January, in the year of our Lord one thousand eight hundred and fifty-five, before the judge aforesaid, at the court-house aforesaid, at the aforesaid term of said court, the following order was duly made and entered in said cause, to the record in this action, and is in the words and figures as follows, to wit:

At a stated term of the circuit court of the United States of America, for the districts of California, held at the court-house in the city of San Francisco, on Friday, the 8th day of January, in the year of our Lord one thousand eight hundred and fifty-six.

Present, the honorable M. Hall McAllister, judge of said court.

JOHN BERTRAM et als.
vs.
JOSEPH H. LYON. } Common law.

And now, at this day, come the parties to this cause, by their respective counsel, and argument being heard on the demurrer filed in this cause, to the plea to the jurisdiction, it is considered and ordered by the court that the demurrer be sustained.

Endorsed:

Filed 8th day of January, A. D. 1856.

GEO. PEN. JOHNSTON, *Clerk.*

And afterwards, to wit, on the twenty-third day of February, in the year of our Lord one thousand eight hundred and fifty-six, the special verdict heretofore rendered in this cause was filed among the papers in said cause, and by a stipulation endorsed thereon it is made a part of wit:

United States Circuit Court for the districts of California, in and for the State of California.

JOHN BERTRAM, ALEX'R H. TWOMBLY,
EDWIN LAMSON,
vs.
JOSEPH H. LYON.

Afterwards, that is to say, on the 23d day of February, 1856, at the court-house in the city of San Francisco, before M. H. McAllister, esq., judge of said circuit court, come, as well the within named plaintiffs as the within named defendant, by their respective attorneys within mentioned, and the jurors of the jury summoned to try the said issue being called, also come, who, to speak the truth of the matter within contained, being chosen, tried, and sworn, say upon their oath,

that on the thirteenth January, 1853, James P. Flint, Edward P. Flint, Alfred Peabody, John Bertram, Alexander H. Twombly, and Edwin Lamson, citizens of the State of Massachusetts, were the owners of a cargo of flour, consisting of two thousand barrels, called and branded, and which in fact was, "Gallego," then being on board the bark Ork, lying at Central wharf, in the city of San Francisco, the same being a public wharf in said city, in which said cargo of flour they were interested as owners in the following proportions, namely, James P. Flint, Edward P. Flint, and Alfred Peabody one-fourth, John Bertram one-half, Alexander H. Twombly and Edwin Lamson one-fourth.

The said two thousand barrels composing the entire cargo of flour then on board said bark Ork, and which said cargo inspected as follows, superfine 1771, bad 229 barrels.

The firm of Flint, Peabody & Co., composed of James P. Flint, Edward P. Flint, Alfred Peabody, and George H. Kellogg, were the factors of said owners at the said time, at the city of San Francisco; on the said 13th January the following written agreement was made and concluded upon between said Flint, Peabody & Co., acting as the factors of the owners, and the defendant, at the city of San Francisco.

SAN FRANCISCO, *January* 13, 1853.

Sold this day to Joseph H. Lyon, esq., a cargo of Haxall flour, now on board the bark Ork, lying in this harbor, being about two thousand barrels, on the following terms and conditions, viz: Joseph H. Lyon, esq., agrees to pay Messrs. Flint, Peabody & Co. thirty dollars per barrel of such as shall inspect superfine, and twenty-seven dollars per barrel for such as shall inspect bad; payment to be made as it may be delivered, and to be received and paid for on or before the expiration of three weeks from date.

If Messrs. Flint, Peabody & Co. elect, they can land and store the flour at the expiration of one week, or so much as may remain on board at that time; Mr. Lyon paying storage and drayage expenses.

J. H. LYON,
FLINT, PEABODY & CO.

On the 25th January, 1853, the defendant applied to Flint, Peabody & Co. for fifty barrels of flour, so purchased by him, by a written order, as follows:

SAN FRANCISCO, *January 25th*, 1853.

Mesrs. FLINT, PEABODY & Co.

Will please deliver Mr. Wm. R. Gorham, or bearer, fifty barrels of flour out of the lot purchased from the ship Ork, and oblige

J. H. LYON.

Paying them therefor the contract price, $30 per barrel, amounting to the sum of $1,500; and received from Flint, Peabody & Co. the following delivery order:

SAN FRANCISCO, *Jan'y* 25, 1853.

CAPTAIN OF BARK "ORK:"

Please deliver the bearer fifty barrels superfine flour, and oblige

FLINT, PEABODY & CO.

Fifty barrels of Gallego flour, inspecting superfine, being part of said cargo of flour on board the bark "Ork," was then delivered from off said bark to one William R. Gorham, a baker, to whom the said defendant had sold and transferred the said delivery order, and the said flour, and who demanded and received the same.

All the flour on board the said bark "Ork" on the said 13th January was of the brand known as and called Gallego, in barrels, and branded on both heads as "Gallego" in printed characters from two to two and one half inches in length each.

On the 31st January, 1853, the defendant made further application to Flint, Peabody & Co., for one hundred barrels of superfine flour from bark "Ork," being part of the flour so purchased by him as aforesaid, and in payment thereof gave Flint, Peabody & Co. his check on Tallant & Wilde, bankers of said city, and received from them a delivery order, which is in the words and figures following, namely:

SAN FRANCISCO, *Jan'y* 31*st*, 1853.

CAPT. HUTCHINGS, Bark "Ork:"

Please deliver to J. H. Lyon, or to the order of Grey & Doane, one hundred barrels superfine flour, and oblige

FLINT, PEABODY & CO.

The said check was not paid on presentation. On the 3rd of February, 1853, Flint, Peabody & Co. addressed two several letters to the defendant, which were received by him on that day, and of which the following are copies:

SAN FRANCISCO, *Feb'y* 3, 1853.

J. H. LYON, Esq.

DEAR SIR: This being the last day on which by the terms of the contract of sale the cargo of flour ex "Ork" is to be delivered, we would state that we are prepared to deliver the balance of said cargo, and request that you would receive the same immediately.

Very respectfully, your obed't serv'ts,

FLINT, PEABODY & CO.

SAN FRANCISCO, *February* 3, 1853.

TO J. H. LYON.

DR. SIR: As you decline receiving the balance of flour ex "Ork," in accordance with terms of contract of sale, we would notify you, that the balance of said cargo will be sold at public auction on Saturday, the fifth day of February, for your account, and that we shall hold you responsible for the difference there may be in the nett proceeds of such sale and the amount it was sold to you for, together with the damages and expenses incurred by delay.

FLINT, PEABODY & CO.

Subsequent to the sale, and up to and including the 28th January, 1853, Gallego and Haxall flour had advanced to $35 per barrel each, and between the 28th January and 5th February, flour of those brands had fallen to $18 per barrel.

In the opinion of some experts, there existed no difference in the quality or price of flour branded and known as Gallego and Haxall, each inspecting superfine, but in the opinion of other experts there was a difference, some preferring Haxall and some Gallego.

The order of January 25 | 53, was made by the defendant to William R. Gorham, and at the time of the sale the defendant represented to said Gorham that the flour was Haxall.

The order of January 29th, 1853, was to comply with a sale made to James Dunne and Peter Dunne by the defendant, and was, in like manner, represented to them by the defendant to be Haxall, and who, at the time, gave to said James Dunne and Peter Dunn the following order:

SAN FRANCISCO, *January* 29, 1853.

Mess. GREY & DOANE

Will please deliver Mess. Dunne & Co. fifty barrels Haxall flour from "Ork." J. H. LYON.

That the said James and Peter Dunne, on discovering that the flour was not Haxall but Gallego, refused to take it, and so notified the defendant; and that the defendant, on learning the fact, refused to receive the rest of the cargo, and notified said Flint, Peabody & Co., and countermanded his check on Tallant & Wilde, before mentioned, who refused payment.

The balance of said cargo was publicly advertised for sale at the said city, by Flint, Peabody & Co., on the 5th February, 1853, due notice of the time and place of sale having been previously given to the defendant, and that the same was publicly sold on that day, on account of whom it might concern, yielding $26,172 67 nett proceeds.

On the 16th February, 1854, at the city of Boston, State of Massachusetts, James P. Flint, Alfred Peabody, and Edward P. Flint, sold and released to the plaintiffs all their and each of their interest in the said flour contract, by a written instrument, under their hands and seals.

On the 18th November, 1854, notice of said release and sale was given to the said defendant, by serving him with a written notice and demand at the said city, in the following words and figures:

Mr. JOSEPH H. LYON.

SIR: You will please take notice, that Mess. James P. Flint, Alfred Peabody, and Edward P. Flint, have assigned and released to Mess. John Bertram, Alexander H. Twombly, and Edwin Lamson, all their interest in the demand heretofore existing in favor of all the aforesaid parties against you, for the price of two thousand barrels of flour sold you by them, by written contract dated January 13th, 1853, and you are accordingly requested to make immediate payment of the balance

due by you thereon to the said Bertram, Twombly, and Lamson, or to the undersigned as their attorney.

The instrument of assignment is in our possession, subject to your inspection.

Dated San Francisco, November 17, 1854.

Respectfully, yr. obed't serv't,

JOHN K. HACKETT,

Atty. for Mess. BERTRAM, TWOMBLY & LAMSON.

Which said request was then and there refused by the defendant.

But, whether or not, upon the whole matter aforesaid, by the jurors aforesaid, in form aforesaid found, the said defendant did promise and undertake, in manner and form as is in his said complaint alleged, the jurors aforesaid are altogether ignorant, and thereupon pray the advice of the circuit court of the United States for the districts of California, before the aforesaid judge thereof; and if, upon the whole matter aforesaid, it shall seem to the said court that the said defendant did undertake and promise as is in and by the plaintiff's said complaint alleged, then the jurors aforesaid, upon their oath aforesaid say, that the said defendant did undertake and promise, in manner and form as the said plaintiffs have within thereof complained against him, and in that case they assess the damages of the said plaintiffs, by reason of the matter aforesaid, besides the costs and charges by them about their suit in that behalf expended, to $32,198 37; but if, upon the whole matter aforesaid, it shall seem to the said court that the said defendant did not undertake and promise, as alleged by the said plaintiffs in their said complaint, then the jurors aforesaid, upon their oath aforesaid say, that the said defendant did not undertake and promise, in manner and form as the said plaintiffs have alleged in and by their said complaint.

It is hereby stipulated, that the within special verdict be entered and recorded in this action.

(Signed) JOHN K. HACKETT,
Att'y for Pl'ffs.

(Signed) HEPBURN & MUSSON,
For Def't.

Dated San Francisco, February 23d, 1856.

Endorsed:

Filed, Feb'y 23d, A. D. 1856.

GEO. PEN. JOHNSTON, *Clerk.*

And afterwards, to wit, on the third day of March, in the year of our Lord one thousand eight hundred and fifty-six, judgment was entered in said cause, in the decree register of said court, in words and figures as follows, to wit:

UNITED STATES OF AMERICA,
State of California.

In the Circuit Court of the United States for the districts of California.

JOHN BERTRAM, ALEXANDER H. TWOMBLY, AND EDWIN LAMSON,
vs.
JOSEPH H. LYON.

Case submitted on agreed verdict. This case came on to be heard at the present term of this court, and counsel having been heard for the respective parties, after due deliberation, it is ordered, considered, adjudged and decreed, that the plaintiffs do recover from the defendant the sum of thirty-two thousand one hundred and ninety-eight dollars and thirty-seven cents. Also costs of suit, to be taxed herein by the clerk.

(Signed) M. H. McALLISTER,
Judge cir. court of the U. S. for the dist's of Cal'a.

Dated San Francisco, March 3d, 1856.

And afterwards, to wit, on the third day of March, in the year of our Lord one thousand eight hundred and fifty-six, the written opinion of the honorable circuit judge on the special verdict was filed in this cause, to become of record herewith, and is in words and figures as follows, to wit:

U. S. Circuit Court—M. H. McAllister, Judge.

JOHN BERTRAM and others
vs.
JOSEPH H. LYON.

This action is brought by vendor against vendee, to recover the purchase-money of two thousand barrels of flour sold. A special verdict has been agreed upon by the parties, and upon which the judgment of this court is invoked.

To ascertain the issue to be tried between the parties, it is necessary to refer to the pleadings. The complaint is brought by the vendor to recover the purchase-money due for a certain lot of flour sold to defendant.

The answer of defendant consists of six different pleas. The first is that of the statute of limitations, and the sixth is a denial of that portion of the complaint which alleges an assignment by Flint, Peabody & Co., of the present claim to the pl'ffs. These two pleas are dispensed with by the verdict agreed on, and the court is remitted exclusively to the issues raised by the four intermediate pleas or answers; all these resolve themselves into a general denial of the allegations of the complaint, setting up, as they do, a contract of sale. The whole argument of defendant's counsel has been predicated upon the ground that there has been no contract established in this case.

It is contended, that the description in the written contract of "Haxall" flour, when the flour turned out to be "Gallego" flour, rendered the contract void, upon the principle of law which declares that, to constitute a contract, there must be not only a grantor and a grantee, but a thing granted. That this case comes within the operation of the rule that where parties contract in relation to a thing which at the time of the execution of the contract they believed to be in existence, and which it is ascertained had no existence at the time, the whole contract is void, inasmuch as the consent of the parties had never met upon the subject-matter of the contract, it not being in existence at the time.

In this case, by the facts patent upon the special verdict, it appears that the assignors of plaintiffs were owners of a cargo of flour consisting of two thousand barrels, branded as "Gallego," being at the time on board the barque Ork, lying in this harbor, composing the entire cargo of said barque, and inspecting superfine 1771, bad 229 barrels. That as such owners they entered into written contract with defendant, by which they sold to defendant the "cargo of Haxall flour, now on board the barque, lying in the harbor (of San Francisco,) being about two thousand barrels," on the terms mentioned in said contract; among these terms was, that one price was to be paid for superfine and another for bad flour. It is contended by defendant, that the brand of the flour being described in the contract as "Haxall," whereas in fact it was branded "Gallego," the whole contract was void. It is alone on this ground, so far as the pleading in the case and the argument of counsel for defendant go, that the defence rests. The position thus taken is fortified by the adduction in its support of the authority of the supreme court of this State. In the case of Flint and others vs. Lyon, 4. Calf. Rep. 21, that court, in reference to this very contract, say, "how then stands the case? The contract was founded in mistake, both parties supposing they were contracting concerning a certain article which had no existence, consequently the contract was void for want of the substance of the thing contracted for." If the article sold in this case had no existence at the time of the execution of the contract, and the parties through mistake treated it as being in existence, then it is true, as the supreme court of our State have said, "the contract was void, for want of the substance of the thing contracted for." It would come within the operation of the elementary principle of law, that in order to constitute a legal contract, there must not only be contracting parties, but a thing in existence, the subject-matter of the contract in relation to which the consent of the parties may meet; in other words, in regard to which there may be an "aggregatio mentium."

This rule is practically illustrated in the case of Leach vs. Trullett, 14 Eng. C. L. Rep., 479, where by mistake of parties a house was sold at auction, and so described that it did not refer to the house the parties intended each respectively to buy and sell, but to another house not in the contemplation of either party. Here was a clear mistake as to the substance of the thing contracted for. There are various cases where the article contracted for is of a different species from that treated

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for. Thus where an article was sold as "indigo," which was a fraudulent compound made to resemble indigo, or where a stone was sold as a bezar stone, when in fact it was not such a stone. But in all such and the like cases where, in the absence of fraud, the contract has been deemed void in a court of common law, by reason of the want of a subject-matter, it has been where the substance of the thing is not in esse at time of contract, or the description is so materially wrong that the substance of the thing must be changed, in order to answer the description given in the contract. The inquiry is, whether in fact this case comes within the principles of foregoing rule. The special verdict finds the subject-matter of the contract to have been "a cargo of flour at the time on board the bark Ork, lying in the harbor of San Francisco, being about two thousand barrels." In the written contract the flour thus described is represented to be Haxall, whereas it has turned out to be Gallego flour; and the question is, did these two thousand barrels of flour, the cargo of the barque Ork, cease to exist in substance, or in the language of the authorities, to have "a potential existence," because the brand upon them was different from that described in the contract? In other words, was this description of the brand a representation or a warranty, or was the true brand so essential an element of the flour that the latter ceased to exist in substance when the former was erroneously described, so as to be incapable of being made the subject-matter of a contract under the description actually given?

In the cases in which executed contracts, such as that in controversy, have come under consideration, and in which there had been, through a misapprehension, a misdescription of the article sold, the question which arose was, whether the description amounted or not to a warranty? Thus in Sheppard vs. Kane, 7 Eng. Com. Law Rep., 82, where a ship was described as "a copper-fastened vessel," and it appeared in fact that she was only partially copper-fastened, the court say: "Here the ship was not a copper-fastened ship at all." It is evident in this case, that the article sold was partially, at least, different in substance from that intended to be sold; still, so far from considering the contract void, the court upheld it as a contract, and declared that it was a contract with a warranty. Consequently, in an action for the breach of that warranty, damages were assessed against defendant.

In Seixas vs. Wood, 2 Caine Cases, 48, an action was brought for selling Peachum wood, represented to be Brazillitto—the former worth hardly anything, the latter of considerable value. Now, in this case, the substance of the article was the same. Peachum wood and Brazillitto wood constituted the same substance, although different in name and very different in value. Still the negotiation in relation to it was not treated by the court as a void contract. The question was, whether, there being no express warranty, the law would annex to the contract under the circumstances an implied one. Further references to authorities are needless; but, if necessary, it will be sufficient to refer to the decision of the supreme court of this State, in relation to the contract under consideration already cited. It is true, as stated by defendant's

counsel, that the court in that case declared the "contract to be void for want of the substance of the thing contracted for," 4 Cal. 21; but they in the same opinion take a different view of the sale-note, and recognise it as a contract containing a warranty. Ibid, 20. They decide that "the use of the word 'Haxall' in the sale-note amounted to a warranty that the flour was Haxall." Now, it is impossible to come to the conclusion that there is a warranty in this case, and at same time consider there was no legal contract in existence.

If the contract was void for one purpose it was so for all; and if nuil as to the one party, it is equally so to both. The warranty was created by the contract; the latter must therefore be in existence. The contract is the principal, the warranty the incident. If the former had no vitality, the latter could have no existence. The fair inference then is, that whatever comments were made by the court in 4 Cal. 19, upon the character of this contract, the court in effect and substance recognised a legal contract, which by its provisions fixed upon one party the obligations, and conferred upon the other the rights arising out of a warranty of the article sold. So far as the contract is recognised as a subsisting one by the supreme court of this State, this court is prepared to go. It is a contract which by its terms passed a title to the property sold to defendant; and whether the description inserted in the sale-note amounts to a warranty, and if it does, whether the only remedy for any loss which may have accrued to defendant, (if any such has accrued,) is to be found in an action on a breach of warranty, are questions unnecessary to be decided in this action.

The complaint predicates the cause of action upon the allegation of a sale of a certain cargo of two thousand barrels of flour, and alleges the assumpsit of defendant as arising out of such sale. The question submitted by the special verdict is, whether or not, upon the whole matter found, the said defendant did promise and undertake in manner and form as in the complaint alleged. Now, with the views entertained by the court, the allegations of the complaint are sustained by the proofs. The insertion of the word "Haxall" did not annul the contract, but, at the utmost, amounted to a warranty that the flour should be of that brand. If the pleadings had been so made in this case, and the evidence so marshalled, the one to claim as set-off, or by way of recoupment, the loss which had accrued by reason of the breach of warranty, and the other to ascertain the actual amount of loss arising from such breach, the court could go into the investigation of these questions. But there is no plea stating any special damages, nor any evidence stating the amount. The court considers there was in this case an absolute transfer of the title of the article sold by the contract, and that the description of the wrong brand could not, under the circumstances of this case, annul the contract. Had the pleadings in this case *have* raised the question of the right of defendant to avail of a breach of warranty in this defence, the facts, as disclosed by the special verdict, give no data by which to assess damages. If the contract in this case is a valid one, and granting that the pleadings by defendant were such

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as under the decision of the court would authorize him to give evidence of his loss by breach of the warranty, the measure of damages would be the difference between "Gallego" flour at the time of sale, and "Haxall" flour as it was represented to be in the contract. Now the statement on this question of value in the agreed verdict is as follows: "In the opinion of some experts, there existed no difference in the quality or price of flour branded and known as Gallego and Haxall, each inspecting superfine; but in the opinion of other experts there was a difference, some preferring Haxall, and some Gallego."

This evidence certainly would not authorize the recovery of damages in an action by the party on a breach of the warranty, nor establish any damages for such breach, were he now attempting to set them up by way of defence in the present action.

What then is the present case? The written document, given as the evidence of sale, this court considers to be a contract. It is an entire and an executed contract. It is the transfer of the entire cargo of the barque Ork, which, by its very terms, is sold to defendant, who, in his note of 25th January, 1853, in which he directs a delivery of fifty barrels, writes of them as being out of the lot purchased from ship Ork; and the contract speaks of the delivery, and stipulates, that at the expiration of a certain number of days, if the cargo be not previously delivered, the defendant may land all that remains should he so elect, provided he pays the storage and drayage expenses. The title to this flour became absolutely vested in defendant, and he has actually received a portion of it. There can be no doubt that the said note was a contract—an entire and executed contract; and that the mention of the brand is matter of description, not forming an element in the substance of the flour, so as to have the effect of rendering void the sale-note.

Whether the defendant had a right, on discovering as he did, after the second delivery order, that the brand of the flour was "Gallego," to rescind the contract was not argued by defendant's counsel, and cannot legitimately arise in this case; as at that time, having received and appropriated a portion of the flour, he was not in a position to replace the party on such rescission in *statu quo*.

If the court has erred in these views, the amount involved will enable the party to have such error corrected by a higher tribunal.

And afterwards, to wit, on the seventeenth day of July, in the year of our Lord one thousand eight hundred and fifty-six, the defendant reduced to writing his exceptions to the rulings and decisions of the said court taken on the trial of this cause, and filed them herein, as his first bill of exceptions, in words and figures as follows, to wit:

In the Circuit Court of the United States for the districts of California.

JOHN BERTRAM & als.
vs.
JOSEPH H. LYON.

Be it remembered, that on the trial of this cause, before the court and jury, there was returned by the jury a special verdict, elsewhere appearing in this cause.

And the jury said, that, whether or not upon the whole matter aforesaid, by the jurors aforesaid in form aforesaid found, the said defendant did promise and undertake in manner and form as in the complaint alleged, the jurors aforesaid were wholly ignorant, and therefore prayed the advice of the court; and if upon the whole matter it should seem to the court that the said defendant did undertake and promise, as is in and by the plaintiffs' complaint alleged, then the jurors said that the defendant did undertake and promise in manner and form as the plaintiffs have thereof complained against him, and in that case they assess the damages of the plaintiffs by reason of the matter aforesaid, besides the costs and charges by them about their suit in that behalf expended, to thirty-two thousand one hundred and ninety-eight dollars and thirty-seven cents; but if, upon the whole matter aforesaid, it shall seem to the court that the defendant did not undertake and promise, as alleged by the plaintiffs in their complaint, then the jurors say that the defendant did not promise and undertake in manner and form as the plaintiffs have alleged in and by their complaint.

And afterwards the court, upon said special verdict, gave its opinion in writing, elsewhere appearing in this cause, and therein among other things made the following ruling and decision; that is to say, that "The written document, given as the evidence of sale, this court considers to be a contract. It is an entire and executed contract. It is the transfer of the entire cargo of the barque Ork, which, by its very terms, is sold to defendant, who in his note of the 25th of January, 1853, in which he directs a delivery of fifty barrels, writes of them as being out of the lot purchased from ship Ork, and the contract speaks of the delivery, and stipulates that at the expiration of a certain number of days, if the cargo be not previously delivered, the defendant may land all that remains, should he so elect, provided he pays the drayage and storage expenses."

To which ruling and decision the defendant at the proper time duly excepted, but the court overruled said exception, and the defendant prayed that this his bill of exceptions might be signed and sealed by the court, and made part of the record of this cause, which was accordingly done.

Perused by JOHN K. HACKETT,
Att'y for Pl'ffs.

Allowed.

M. HALL McALLISTER,
Judge C. C.

And afterwards, to wit, on the seventeenth day of July, in the year of our Lord one thousand eight hundred and fifty-six, the defendant reduced to writing, and had sealed by the said district judge, additional exceptions to the rulings and decisions of the said court, taken on the trial of this cause, and filed them herein as his second bill of exceptions, in words and figures as follows, to wit:

In the Circuit Court of the United States for the districts of California.

JOHN BERTRAM and als.
vs.
JOSEPH H. LYON.

Be it remembered, that in the trial of this cause, before the court and jury, there was returned by the jury a special verdict, elsewhere appearing in this cause.

And the jury said that whether or not, upon the whole matter aforesaid, by the jurors aforesaid in form aforesaid found, the said defendant did promise and undertake in manner and form as is in the complaint alleged, the jurors aforesaid were wholly ignorant, and therefore prayed the advice of the court; and if upon the whole matter it should seem to the court that the said defendant did undertake and promise as is in and by the plaintiffs' complaint alleged, then the jurors said that the defendant did undertake and promise in manner and form as the plaintiffs have thereof complained against him, and in that case assess the damages of the plaintiffs, by reason of the matter aforesaid, besides the costs and charges by them about their suit in that behalf expended, to thirty-two thousand one hundred and ninety-eight dollars and thirty-seven cents; but if, upon the whole matter aforesaid, it shall seem to the court that the defendant did not undertake and promise as alleged by the plaintiffs in their complaint, then the jurors say that the defendant did not undertake and promise in manner and form as the plaintiffs have alleged in and by their complaint.

And afterwards the court, upon said special verdict, gave its opinion in writing, elsewhere appearing in this cause, and therein among other things made the following ruling and decision; that is to say, that "the title to this flour became absolutely vested in defendant, and he has actually received a portion of it. There can be no doubt that the said note was a contract—an entire and executed contract; and that the brand is matter of description, not forming an element in the substance of the flour, so as to have the effect of rendering void the sale-note."

To which ruling and decision the defendant at the proper time duly excepted, but the court overruled said exception, and the defendant prayed that this his bill of exceptions might be signed and sealed by this court, and made part of the record of this cause, which was accordingly done.

Perused by me,

JOHN K. HACKETT,
Att'y for Pl'ffs.

Allowed.

M. HALL McALLISTER,
Judge C. C.

And afterwards, to wit, on the seventeenth day of July, in the year of our Lord one thousand eight hundred and fifty-six, a stipulation signed by the attorneys for the respective parties was filed in this cause, in words and figures as follows, to wit:

In the Circuit Court of the United States for the districts of California.

JOHN BERTRAM and als.
vs.
JOSEPH H. LYON.

It is agreed by the parties to this action, plaintiffs and defendant, that the writ of error sued out on the judgment rendered in said action by said Joseph H. Lyon, plaintiff in error, against the said John Bertram, Alexander H. Twombly, and Edwin Lamson, defendants in error, shall stand for trial in the Supreme Court of the United States at the now ensuing December term thereof, without notice of trial or argument, and that the plaintiff may assign error in said Supreme Court at any time before trial; and the defendants in error shall file their joinder in error at or before the calling of the cause for trial, and on failure of the defendants to join in error the plaintiff may proceed to trial without such joinder, and in failure of the plaintiffs to assign error at or before the calling of the cause for trial the defendants may move to dismiss the writ of error. And it is agreed that this stipulation be entered as part of the record of said cause.

Dated July 16th, 1856.

JOHN K. HACKETT,
Plaintiff's Attorney.
SAUNDERS & HEPBURN,
Defendant's Attorneys.

And afterwards, to wit, on the eighteenth day of July, in the year one thousand eight hundred and fifty-six, upon the prayer of the defendant, the following writ of error was duly issued in this case, in the words following, to wit:

UNITED STATES OF AMERICA, *to wit:*

The President of the United States of America, to the Judge of the Circuit Court for the districts of California, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court before you, between John Bertram, Alexander H. Twombly, and Edwin Lamson, plaintiffs, and Joseph H. Lyon, defendant, manifest errors have happened, to the great damage of the said Joseph H. Lyon, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf:

You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, at the capitol, on the first Monday of December next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error,

what of right and according to the law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this 18th day of [SEAL.] July, in the year of our Lord one thousand eight hundred and fifty-six, and of the independence of the United States the eighty-first.

Attest: GEO. PEN. JOHNSTON, *Clerk of the circuit court of the United States for the districts of Cal'a.*

And afterwards, to wit, on the same day last aforesaid, the following citation upon the aforesaid writ of error was duly issued by the judge of said court, in the words following, that is to say:

UNITED STATES OF AMERICA, *to wit:*

To John Bertram, Alexander H. Twombly and Edwin Lamson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the districts of California, wherein Joseph H. Lyon is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable M. Hall McAllister, judge of the circuit court of the United States for the districts of Califor- [SEAL.] nia, at the city of San Francisco, this 18th day of July, in the year of our Lord one thousand eight hundred and fifty-six, and of our independence the eighty-first.

M. HALL McALLISTER,
Judge cir. court U. S. for dist's of Cal'a.

Attest: GEO. PEN. JOHNSTON, *Clerk.*

In the Circuit Court of the United States for the districts of California.

I, Geo. Pen. Johnston, clerk of the circuit court of the United States for the districts of California, at San Francisco, do hereby certify, that the foregoing 60 pages contain a full, correct, and faithful transcript of the record of the proceedings had in the above entitled cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the court-house in the city of San [L. S.] Francisco, this 19th day of July, A. D. 1856.

GEO. PEN. JOHNSTON, *Clerk.*

UNITED STATES OF AMERICA,
Districts of California, ss:

I, M. Hall McAllister, judge of the circuit court of the United States for the districts of California, do hereby certify, that George Pen. John-

ston, who hath signed the foregoing certificate, is, and was on the day of the date of the same, the clerk of said court, at the city of San Francisco, duly commissioned and qualified; that his signature above to said certificate is genuine, and that the said attestation or certificate is in due form of law.

Dated this 19th day of July, A. D. 1856.

M. HALL McALLISTER,
Judge of the circuit court of the United States for the districts of California.

Writ of Error.

UNITED STATES OF AMERICA, *to wit:*

The President of the United States of America, to the judge of the Circuit Court of the United States for the districts of California, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court, before you, between John Bertram, Alexander H. Twombly, and Edwin Lamson, plaintiffs, and Joseph H. Lyon, defendant, manifest errors have happened, to the great damage of the said Joseph H. Lyon, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf:

You are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, at the capitol, on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this 18th day of [SEAL.] July, in the year of our Lord one thousand eight hundred and fifty-six, and of the independence of the United States the eighty-first.

Attest: GEO. PEN. JOHNSTON, *Clerk of the circuit court of the United States for the districts of Cal'a.*

Citation in Error.

UNITED STATES OF AMERICA, *to wit:*

To John Bertram, Alexander H. Twombly, and Edwin Lamson, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first

Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the districts of California, wherein Joseph H. Lyon is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable M. Hall McAllister, judge of the circuit court of the United States for the districts of Califor-
[SEAL.] nia, at the city of San Francisco, this 18th day of July, in the year of our Lord one thousand eight hundred and fifty-six, and of our independence the eighty-first.

M. HALL McALLISTER,
Judge Cir. Court U. S. for Dists. of Cal'a.

Attest: GEO. PEN. JOHNSTON, *Clerk.*

Service of a copy of the within citation is hereby admitted; the within citation having been shown to me at the time of the service of said copy.

July 18, 1856.

JOHN K. HACKETT,
Att'y for Pl'ffs.

In the Supreme Court of the United States.

JOSEPH H. LYON
vs.
JOHN BERTRAM, ALEXANDER H. TWOMBLY, and EDWIN LAMSON. } In error.

On the nineteenth day of July, 1856, before me, George Pen. Johnston, clerk of the circuit court of the United States for the California districts, personally appeared Henry Wilkins, deputy of the marshal of the United States for the northern district of California, and made oath that he served on the 18th day of July, 1856, a copy of the citation in error in the above cause personally upon John K. Hackett, the attorney of record for the defendants in error in the above cause, and at the same time showed to said Hackett the original citation.

HENRY WILKINS,
Deputy Marshal.

Sworn to and subscribed before me this 18th day of July, A. D. 1856.

GEO. PEN. JOHNSTON,
Clerk Cir. Court U. S.